Petition

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81-1875
NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,
Petitioner,

v.

RONALD K. SPIVEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1.

Whether a trial court's charge on sentencing which properly informs a reasonable juror that he should consider all of the facts and circumstances of a capital case as presented during both phases of a bifurcated trial (which necessarily includes any mitigating and aggravating facts particular to the defendant and circumstances of the offense) in reaching his decision on punishment is rendered unconstitutional for failure to include therein a litany of words defining and discussing the term "mitigating circumstances."

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Former Fifth Circuit is reported at Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). A copy of the opinion is set

forth in the Appendix at Appendix 1. Additionally, set forth at Appendix 2 is a copy of the Fifth Circuit's order denying the petition for rehearing en banc.

The opinion of the District Court dismissing the writ of habeas corpus is an unreported decision. See Spivey v. Zant, Case No. 80-3-COL (M.D. Ga. 1981).

JURISDICTION

The judgment of the Court of Appeals for the Former Fifth Circuit was entered on November 16, 1981. See Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). A timely petition for rehearing en banc was filed, but the same was subsequently denied on January 5, 1982. See Appendix 2.

This petition for a writ of certiorari has been timely filed within the allowable ninety day period.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Section I, Fourteenth Amendment to the Constitution:

Section No. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

28 U.S.C. § 2254(a):

. . . [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States.

STATEMENT OF THE CASE

Respondent Ronald K. Spivey was convicted of murder, kidnapping, armed robbery (two counts) and aggravated assault (two counts) on June 30, 1977 in the Superior Court of Muscogee County, Georgia. Respective sentences of death, twenty years imprisonment, life imprisonment and ten years imprisonment were imposed. The evidence before the jury, as concisely recounted in the opinion of the Supreme Court of Georgia, was that:

> . . . Spivey had gone to the Final Approach Cocktail Lounge in Columbus, Georgia, on December 28, 1976, where he consumed several drinks. Shortly before the lounge was to close, Spivey brandished a gun. He ordered the barmaid, Mary Davidson; a waitress, Lucy Weaver; and the only remaining patron in the bar, Burt Marten, to the back of the lounge. He

then took $200 from the cash drawer and $40 from Mary Davidson's purse. The manager of the cocktail lounge across the street, Buddy Allen, and a security guard, Billy Watson, who were both lingering outside, became suspicious because the front doors of the bar had not been closed as usual at the closing hour. They entered the bar and proceeded towards the back area, where Spivey and his hostages were located. As they approached him he turned around suddenly and shot them both, killing Watson on the spot. He then ordered Davidson, Weaver and Marten to leave the lounge with him. As they were leaving Allen moaned, and Spivey turned around and shot him again. Although Allen was severly injured, he was able to run for help to the cocktail lounge across the street, whereupon Spivey sent Weaver and Marten into the lounge to ensure that the police were not called. The police were summoned, and when Spivey became aware of this he fired several shots into the lounge, hitting one of the patrons. He then abducted Mary Davidson and absconded with her to Alabama. He was apprehended

> by police in Alabama, and Mary Davidson was released.
>
> At trial Spivey was positively identified by witnesses Davidson, Weaver and Allen as the perpetrator of these offenses. He did not deny committing the offenses, but asserted that he was not criminally responsible because he was legally insane at the time of the crimes. Spivey v. State, 241 Ga. 477, 246 S.E. 2d 288 (1978).

On direct appeal Respondent argued that, notwithstanding the fact that defense counsel strenously argued to the jury Respondent's mental condition, and particularly Respondent's psychiatric history as alleged mitigating circumstances weighing against imposition of the death penalty, the trial court erred by not specifically charging the jury that the two foregoing factors constituted mitigating circumstances. In response the Supreme Court of Georgia

opined that:

> When Georgia juries are instructed in sentencing to consider all of the facts and circumstances which have appeared in both phases of the trial, this necessarily includes any mitigating circumstances which defendant has shown, or argued, or both. The trial court did not err in failing to use the talismanic words 'mitigating circumstances,' nor did it err in failing to charge specifically that certain evidence was to be deemed mitigating. Id., at 481.

Respondent's convictions and sentences were affirmed on direct appeal at Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. den., 439 U.S. 1039 (1978).

From the affirmation of his convictions and sentences on direct appeal Respondent filed a petition for a writ of habeas corpus in the

Superior Court of Butts County, Georgia. After conducting an evidentiary hearing on February 20, 1979 the habeas court, on March 12, 1979, entered its order denying Respondent habeas relief.

On April 24, 1979 the Supreme Court of Georgia denied Respondent's application for a certificate of probable cause to appeal the denial of habeas relief.

From the denial of habeas relief in the state courts Respondent, on September 21, 1979, filed a petition for a writ of certiorari in this Court, which petition was denied at Spivey v. Zant, 444 U.S. 957 (1979).

Respondent next sought habeas relief in the United States District

Court for the Middle District of Georgia via a petition filed on December 20, 1979. By order and judgment dated February 29, 1980 the District Court denied Respondent's request for habeas relief.

On appeal, however, the United States Court of Appeals for the Former Fifth Circuit, in parts pertinent to this petition, granted Respondent habeas relief in the form of an order vacating Respondent's sentence of death. In direct conflict with the opinion of the Supreme Court of Georgia in Spivey v. Zant, supra, the United States Court of Appeals opined that the sentencing instruction found to pass constitutional muster by the Supreme Court of Georgia and the United States District Court was in fact

constitutionally deficient because the instruction allegedly did not properly guide and focus the jury's discretion nor properly describe the nature and function of mitigating circumstances.

The federal appellate court, on January 5, 1982, denied Petitioner's timely filed petition for rehearing en banc. (Appendix 2).

SUMMARY OF THE ARGUMENT

The trial court's instruction on the sentencing phase of trial properly informed any reasonable juror that he should consider all the facts and circumstances of the case as presented during both phases of the bifurcated trial (which necessarily included any mitigating and aggravating factors particular to the defendant and the circumstances of the offense), in reaching his decision on punishment. This instruction, notwithstanding the fact that defendant's counsel strenuously argued to the jury the alleged mitigating circumstances contained in the defendant's evidence, properly focused the jury's discretion to choose life or death as a punishment upon the particular

characteristics of the defendant and the specific circumstances of the crime. Thus, contrary to the conclusion reached by the federal appellate court, the trial court's instruction was not rendered unconstitutional for failure to include therein a litany of words defining and discussing "mitigating circumstances," which formalistic litany this Court has never required.

ARGUMENT AND CITATION OF AUTHORITY

I. WHEN THE TRIAL COURT'S CHARGE ON SENTENCING PROPERLY INFORMS A REASONABLE JUROR THAT HE SHOULD CONSIDER ALL OF THE FACTS AND CIRCUMSTANCES OF A CAPITAL CASE AS PRESENTED DURING BOTH PHASES OF A BIFURCATED TRIAL (WHICH NECESSARILY INCLUDES ANY MITIGATING AND AGGRAVATING FACTORS PARTICULAR TO THE DEFENDANT AND THE CIRCUMSTANCES OF THE OFFENSE), IN REACHING HIS DECISION ON PUNISHMENT, THE COURT'S INSTRUCTION IS NOT RENDERED UNCONSTITUTIONAL FOR FAILURE TO INCLUDE A LITANY OF WORDS SPECIFICALLY DEFINING

THE TERM "MITIGATING CIRCUMSTANCES" AND DISCUSSING THE SAME.

This case presents a clear and direct conflict, as the same is contemplated by this Court's Rule 17(1)a & c, between the Fifth Circuit Court of Appeals and the Supreme Court of Georgia in at least the following cases. Cunningham v. State, ___Ga.___ (Case No. 37736, 1981); Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981); Waters v. State, 248 Ga. 355, 283 S.E. 2d 238 (1981); High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981); Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219 (1981); Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980); Collier v. State,

244 Ga. 553, 261 S.E.2d, 364 (1979); Baker v. State, 243 Ga. 710, 257 S.E. 2d 192 (1979); Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978); Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978); Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978); Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978); Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977); Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977); Dobbs v. State, 236 Ga. 427, 224 S.E.2d 3 (1976); Gaddis v. State, 239 Ga. 238, 236 S.E.2d 594 (1977); Gibson v. State, 236 Ga. 874, 226 S.E.2d 63 (1976); Goodwin v. State, 236 Ga. 339, 223 S.E.2d 703 (1977); Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974).

The issue presented for this Court's consideration is concise:

Having found the defendant guilty of murder after having heard all of the defendant's evidence both in defense to the crime charged and in mitigation of his role played in its commission and after listening to argument of defendant's counsel on the sentencing phase of trial wherein counsel stressed the defendant's evidence in mitigation of punishment, does a charge to the jury instructing them that "[In] reaching this determination [on the sentence to be imposed], you are authorized to consider all the evidence received by you in open court, and both phases of the trial. You are authorized to consider all the facts and circumstances of the case" properly focus the jury's discretion to choose life or death as a punishment upon the

particular characteristics of the defendant and the specific circumstances of the crime?

In Gregg v. Georgia, 428 U.S. 153 (1976) this Court found Georgia's statutory scheme for the imposition of capital punishment to pass constitutional muster. Id., at 207. Describing Georgia's statutory scheme in Gregg, supra, this Court stated that:

> The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channelled. No longer can a jury wantonly and

> freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. Id., at 206-207.

In Woodson v. North Carolina, 428 U.S. 280 (1976), a case in which this Court reviewed the constitutionality of a state statute making the death penalty mandatory for first degree murder, this Court found the subject statute not to pass constitutional muster for it failed to allow for the consideration by the sentencing authority of the "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." Id., at 304.

In Lockett v. Ohio, 438 U.S. 586 (1978), a case in which this Court examined a state statute which limited the mitigating factors which could be

considered by the sentencing authority, this Court found the subject statute not to pass constitutional muster. In Lockett, supra, this Court stated that:

> [T]he eighth and fourteenth amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id., at 604. Accord, Bell v. Ohio, 438 U.S. 637 (1978).

As correctly noted by the Fifth Circuit, this instant case is not one in which the jury's authority to consider mitigating circumstances was in any manner limited or circumscribed. Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981).

> [T]he court charged the jurors that they were 'authorized to consider all the facts and circumstances of the case,' and said nothing which could be construed to limit the jury's consideration of mitigating circumstances. Thus, this case is not within the narrow holding of Lockett or Bell. Id., at 470.

It is the Petitioner's contention that the charge on sentencing in this instant case passes constitutional muster as that standard has been articulated by this Court in Gregg, supra; Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 929 (1976); Woodson, supra; Roberts v. Louisiana, 428 U.S. 325 (1976); Lockett, supra and Bell, supra. Notwithstanding the foregoing, the Fifth Circuit has sought to impose requirements in capital cases that neither this Court nor the United States

Constitution demand. Citing Lockett, supra, and Bell, supra, immediately after noting the narrow nature of this Court's holding in the aforementioned cases, the Fifth Circuit stated that it has read into these opinions the requirement that a trial court recite a magic litany of words in apprising the jury of their authority to consider those facts particular to the offender and the circumstances of the offense in reaching their decision on punishment. Though the same has never been required by this Court the Fifth Circuit has now determined that a trial court must define "mitigating circumstances" and discuss the supposed functions of the same in its charge on sentencing.

Contrary to the position taken by the Fifth Circuit, the proper standard by

which to judge the constitutionality of the subject charge is not by whether the magic litany of words is contained therein, but rather:

> [T]he ultimate test is whether a reasonable juror, considering the charge as a whole, would know that he should consider all the facts and circumstances of the case as presented during both phases of the trial (which necessarily includes any mitigating and aggravating facts), and then, even though he might find one or more of the statutory aggravating circumstances to exist, would know that he might recommend life imprisonment.
>
> The test is substantive rather than formalistic and conforms with the mandate of the Supreme Court of the United States that 'a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' (Cites omitted). Spivey v. State, 241 Ga. 477, 481, 246 S.E.2d 288, cert. den., 439 U.S. 1039 (1978). Accord, Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219 (1981).

In this instant case the trial court's instruction passes constitutional muster as it properly focused the jury's discretion to choose life or death as a punishment upon the particular characteristics of the defendant and the specific circumstances of the crime. Having complied with the substantive concerns of this Court as expressed in the cases cited, supra, the subject charge is not rendered unconstitutional for failure to recite therein a formalistic litany of words not heretofore required by this Court or the United States Constitution.

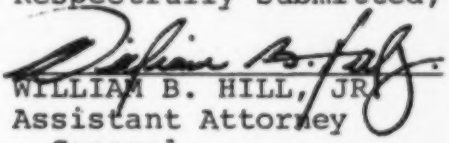
Because of the direct conflict between the decision of the Fifth Circuit in this instant case and the numerous decisions of the Supreme Court of Georgia cited supra, Petitioner

respectfully requests that this Court grant this petition for a writ of certiorari and ultimately and finally adjudicate this constitutional question.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



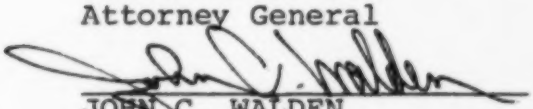
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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., Attorney of Record for the Petitioner and a member of the Bar of the Supreme Court of the United States do hereby certify that in accordance with the rules of the Supreme Court of the United States I have served two copies of this petition for a writ of certiorari upon the Respondent by depositing the same in the United States mail with sufficient first-class postage affixed thereto and addressed to counsel for Respondent as follows:

Mr. Jeffrey D. Colman
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One IBM Plaza
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This 2nd day of April, 1982.

/s/ WILLIAM B. HILL, JR.

Appendix

Ronald K. SPIVEY,

Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellee.

No. 80-7243.

United States Court of Appeals,
Fifth Circuit*
Unit B

Nov. 16, 1981

Appeal from the United States District Court for the Middle District of Georgia.

Before DYER, TJOFLAT and FAY Circuit Judges.

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 -- October 14, 1980.

TJOFLAT, Circuit Judge:

I.

On June 30, 1977, a jury in the Superior Court of Muscogee County, Georgia, convicted the petitioner, Ronald Keith Spivey, of one count each of murder and kidnapping and two counts each of aggravated assault and armed robbery. In a separate sentencing proceeding, the same jury recommended that Spivey be sentenced to death on the murder charge. The trial judge followed that recommendation and sentenced Spivey to death; he sentenced Spivey to life imprisonment on the armed robbery charges, twenty years on the kidnapping charge, and ten years on each assault charge.

The Supreme Court of Georgia affirmed the conviction and the death sentence, and the Supreme Court of the United States denied certiorari. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978).

Spivey then filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. That court conducted an evidentiary hearing and then denied the petition. Spivey's application to the Supreme Court of Georgia for a certificate of probable cause to appeal was denied, and the Supreme Court of the United States denied certiorari. Spivey v. Zant, 444 U.S. 957, 100 S.Ct. 438, 62 L.Ed.2d 330 (1979).

On December 20, 1979, Spivey filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia and requested an evidentiary hearing. The district court issued its order on February 29, 1980, denying Spivey's request for an evidentiary hearing and his petition for the writ.

On appeal, petitioner asserts three grounds for relief from his death sentence: (1) that the Georgia trial court's capital sentencing instructions to the jury were constitutionally inadequate; (2) that the prosecutor's argument to the jury during the sentencing phase of the trial was improper and prejudicial in violation of the eighth and fourteenth amendments; (3) that the

trial court's dismissal for cause of a particular venireman was improper because the venireman's expressions of misgivings about capital punishment fell short of the unequivocal unwillingness to impose the death penalty which is required by Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). For reasons set out in Part II of this opinion, we hold that the state trial court's sentencing instructions were constitutionally inadequate, and we therefore reverse the federal district court's judgment to the contrary. So holding, we do not reach Spivey's second and third challenges to his death sentence.[1]

1/ Regarding the propriety of the prosecuting attorney's argument during the sentencing phase, and mindful that because of our disposition of this case the State may initiate a second
(Footnote continued next page)

Petitioner also asserts three grounds for relief from his conviction: (1) that in violation of the sixth and fourteenth amendments, the trial court deprived him of guidance from counsel in the preparation of his defense by compelling him over his objection to undergo a sanity examination without notice of the purpose of the examination, at a time when he was not represented by counsel and had not raised an insanity defense;

1/ (Continued)

sentencing proceeding, we do note the importance of the trial court's role in insuring that jury arguments remain relevant and fair. See Bruce v. Estelle, 483 F.2d 1031, 1040 (5th Cir. 1973), cert. denied, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977), overruled in part on other grounds, Zapata v. Estelle, 585 F.2d 750, 752 (5th Cir. 1978).

(2) that the State's introduction into evidence of the testimony of the psychiatrist who conducted the sanity examination violated petitioner's fifth and fourteenth amendment rights;[2] (3) that he

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2/ Spivey's appeal brief comes perilously close to abandoning his fifth amendment argument by focusing on the sixth amendment exclusively in the Summary of Argument and nearly exclusively in the Argument itself. Only by a brief reference to the fifth amendment in a footnote to his sixth amendment argument did petitioner avoid abandoning his fifth and fourteenth amendment claim under Fed. Rule. App. Proc. 28(a)(4). See, e.g., Harris v. Plactics Mfg. Co., 617 F.2d 438 (5th Cir. 1980).

was deprived of the effective assistance of counsel because of his attorney's failure to investigate, prepare, and effectively present an insanity defense and to develop a single mitigating circumstance in this capital case. For reasons set out in Part III of this opinion, we hold that the district court erred in denying petitioner's request for an evidentiary hearing concerning the deprivation of his sixth and fourteenth amendment rights associated with the sanity examination, and we therefore remand for an evidentiary hearing. Since the district court's determination of the sixth amendment issue on remand may render decision on the fifth amendment claim superfluous, we do not reach that issue. Finally, for reasons set out in Part IV, we affirm so much of the district court's judgment as denied petitioner

relief based on ineffective assistance of counsel.

II.

In the sentencing phase of Spivey's trial, following jury arguments by both sides, the trial court instructed the jury:

> Ladies and gentlemen, you have found the defendant guilty of the offense of murder. It is now your duty to determine, within the limits prescribed by law, the penalty that shall be imposed as punishment for that offense. In reaching this determination you are authorized to consider all of the evidence received by you in open Court, and both phases of the trial. You are authorized to consider all the facts and circumstances of the case.
>
> Under the laws of this State, every person guilty of the offense of murder, shall be punished by life in the penitentiary, or death by electrocution.

I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances, as I will define to you later in the charge, sufficient to authorize the supreme penalty of the law.

I charge you that a finding of statutory aggravating circumstances shall only be based upon evidence convincing your mind beyond a reasonable doubt as to the existence of one, or of the factual condition in connection with the defendant's perpetration of acts for which you have found him guilty.

Now, the law provides certain aggravating circumstances which you may consider for this purpose. If the offense of murder was committed while the offender was engaged in the crime of another capital felony, in this case, the capital felony charged by the State is that of armed robbery, I have given you in change, you have received the definition of armed robbery.

The statutory instructions that you are authorized to consider

will be submitted in writing to you the jury for your consideration. If you fix his punishment as death, you must also designate in writing that aggravating circumstance which you find beyond a reasonable doubt.

Your verdict must be agreed to by all twelve of your members, it must be in writing, entered upon the indictment, dated and signed by your foreman, and returned in to Court for publication.

You may retire and begin your deliberations, after you have received the indictment and documented evidence adduced in the pre-sentence hearing, and then determine the penalty or punishment that shall be imposed in this case. You must first consider and find beyond a reasonable doubt that the aggravating circumstance, or the murder happening while in the perpetration of another capital felony, armed robbery; armed robbery is a capital felony, you must find that beyond a reasonable doubt.

If you find that to exist, then you shall so indicate in writing, then you will determine whether or not you will impose the death penalty, and your verdict then will be one of two: "We the jury

> recommend the death penalty," or "We the jury do not recommend the death penalty." That is a matter for your determination, ladies and gentlemen.
>
> You will have this in writing to carry out with you to assist you in the preparation of your verdict. You may retire at this time and fix punishment in this case.

Petitioner asserts that the charge did not mention or define mitigating circumstances, did not instruct the jury that it could apply principles of mitigation, and did not identify a particular mitigating circumstance of which there was evidence and which was well-founded in Georgia law.[3] Spivey

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3/ The mitigating circumstance to which petitioner refers is mental disturbance. Spivey presented an insanity defense during the guilt phase of the trial, and his attorney relied on Spivey's mental condition in his jury argument in the sentencing phase. On direct review, the Supreme Court of Georgia concluded (Footnote continued on next page).

3/ (Continued)

that "[t]here was evidence . . . that would have authorized the jury to find that Spivey committed the murder while under the influence of extreme mental or emotional disturbance." Spivey v. State, 241 Ga. 477, 478, 246 S.E.2d 288, 290 (1978). The mitigating effect of such a mental condition is well-founded in Georgia law; the Georgia Supreme Court requires the trial judge to file in each case in which the death penalty is imposed a report which identifies eight mitigating circumstances, including "The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." Petitioner argues that where, as here, evidence of a mitigating circumstance which is well-founded in state law is presented at trial, the sentencing instruction must idenitfy that circumstance. The State contends not only that such an enumeration of mitigating circumstances is not constitutionally compelled, but also that an enumeration would open the instruction to the charge that it impermissibly restricted the jury's consideration of unidentified factors, even if the trial court also instructed the jury it was authorized to consider nonenumerated circumstances. We do not decide in this case whether the federal constitution requires a trial court to identify particular mitigating circumstances in its jury instructions. Regarding the State's concern, however, (Footnote continued on next page).

contends that such an instruction is violative of the eighth and fourteenth amendments. To address this claim, we first determine what instruction on mitigation, if any, the eighth and fourteenth amendments require in a sentencing charge, and then test the charge in Spivey's case by that standard.

[1] The United States Supreme Court struck down the death penalty in Georgia and in thirty-nine other states in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972),

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3/ (Continued)

we note that another panel of this court has approved in principle, though it did not require, an enumeration of statutory mitigating circumstances followed by a nonlimiting instruction. Washington v. Watkins, 655 F.2d 1346, 1377 (5th Cir. 1981) (dictum).

holding that the death penalty could not be imposed under a sentencing procedure that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (plurality opinion). After Furman, Georgia enacted a new death penalty statute. The Supreme Court reviewed that statute and the statutes of four other states in 1976. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)(plurality opinion); Proffitt v. Flordia, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)(plurality opinion); Woodson v. North Carolina, 428 U.S. 280,

96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)(plurality opinion). In those cases the Court established that a death sentence could be imposed if a state fulfilled its "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)(plurality opinion). See Gregg v. Georgia, 428 U.S. at 188-195, 96 S.Ct. at 2932-2936. Accordingly, the constitution requires that a state death sentencing procedure "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition on him of a sentence

of death." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2991.

Elaborating on Woodson, a plurality of the Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[4] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

4/ The Court reserved opinion on whether a mandatory death sentence might be permissible to deter certain kinds of homicide, such as a murder by a prisoner serving a life sentence. No such homicide is in issue here.

Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978)(plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978)(plurality opinion). Lockett and Bell held unconstitutional the Ohio death penalty statute, which precluded the sentencer from considering certain sorts of mitigating circumstances.[5]

5/ Once a verdict of aggravated murder with specifications had been returned, the Ohio statute required the judge to impose a death sentence unless after "considering the nature and circumstances of the offense" and the defendant's "history, character, and condition," he found by a preponderance of the evidence that (1) the victim of the offense had induced or facilitated it, or (2) that it was unlikely that the offender would have committed the offense but for the fact that he or she "was under duress, coercion, or strong provocation," or (3) the offense was primarily the produce of the offender's psychosis or mental deficiency. Ohio (Footnote continued on next page).

The sentencing instruction that was given to Spivey's jury did not directly preclude the jury from considering as a mitigating circumstance whatever it wished; the court charged the jurors that they were "authorized to consider all the facts and circumstances of the case," and said nothing which could be construed to limit the jury's consideration of mitigating circumstances. Thus, this case is not within the narrow holding of Lockett or Bell.

5/ (Continued)

Rev.Code §§ 2929.03-2929.04(B) (1975 Repl.Vol.) Thus, as the Court found, considerations of a defendant's comparatively minor role in the offense, or age, would generally not be permitted to affect the sentencing decision. Lockett, 438 U.S. at 608, 98 S.Ct. at 2967.

However, this Circuit has read Lockett and Bell to require clear instructions on mitigation and the option to recommend against death. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978), was an appeal from a district court's denial of certain portions of a habeas corpus petition. We first affirmed the judgment of the district court, and then addressed an issue which the petitioner raised for the first time during oral argument, namely, whether the trial judge's instructions to the jury about mitigating circumstances and the option to recommend mercy were constitutionally inadequate. In order to decide whether the challenge to the sentenceing instructions had to be remanded so that petitioner could exhaust his state remedies, we were required

to determine whether the challenge permitted the petitioner to claim a substantial denial of a federal constitutional right, which was the state's standard for permitting collateral attack. 581 F.2d at 447.

In view of Lockett and Bell, we concluded that the petitioner's challenge did implicate a substantial denial of a federal constitutional right. Id. Having calculated that a six-member majority of the Supreme Court would vacate a death sentence imposed by a sentencer barred from considering mitigating circumstances,[6] we reasoned:

6/ The six-member majority consisted of the four-man Lockett plurality, Justice Marshall, who appeared to have suggested that the sentencer must be allowed to consider "the unique individuality of every criminal defendant," Lockett, (Footnote continued on next page).

> This constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is aware of what it may consider in reaching its decision. We read Lockett and Bell, then, to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death.

Id. at 448. [7]

6/ (Continued)

438 U.S. at 621, 98 S.Ct. at 2973 (Marshall, J., concurring in the judgment), and Justice Brennan, who did not hear Lockett but who consistently maintained that the death penalty was unconstitutional. The recent resignation of Justice Stewart reduced the aggregation to five, but a majority remains.

7/ The State questions the authority of Chenault since we did not there reach the merits of the petitioner's claim. But as Spivey points out, Chenault's position on sentencing instructions is more than mere dictum; in order to hold that the challenge to the instruction was not properly before us, we necessarily decided that a substantial federal constitutional right was implicated.

In Chenault, we treated the requirement of clear instructions on mitigation and on the option to recommend against death as a corollary to Lockett's prohibition against instructions which preclude consideration of mitigating circumstances. Antecedent support for the constitutional requirement of clear sentencing instructions in capital cases derives from the Supreme Court's earlier conclusion that the eighth and fourteenth amendments require that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. U.S., 428 U.S. at 188-189, 96 S.Ct. at 2932:

> [T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given . . . To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision . . . .
>
> It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Id. at 192-193, 96 S.Ct. at 2934.

[2-5] In light of Lockett, Gregg, and Chenault, we hold that the eighth and fourteenth amendments require that when a jury is charged with the decision

whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . ." Jurek v. Texas, 428 U.S. at 274, 96 S.Ct. at 2957. In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is[8]

8/ The constitution does not require the use of the words "mitigating
(Footnote continued on next page).

and what its function is in the jury's sentencing deliberations. In some instances, it will be possible for the judge clearly to instruct the jury so as to guide and focus its consideration of the particularized circumstances of the individual offense and the individual

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8/ (Continued)

circumstances." So long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment. Coker v. Georgia, 433 U.S. 584, 590-91, 97 S.Ct. 2861, 2865, 53 L. Ed.2d 982, this portion of the constitutional requirement is satisfied.

offender without explicitly defining the nature and function of mitigating circumstances:[9] if, for example, the state

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9/ We recognize that when we announced in Chenault that we read Lockett and Bell to mandate clear instructions about mitigating circumstances and the option to recommend against death, we did not intimate that there might be exceptions to this requirement. But the particular questions before us in Chenault, see slip op. pp. 13148-13149, pp. _____ _____, supra, did not call for a thorough exposition of eighth and fourteenth amendment requirements. Furthermore, our holding today is harmonious with Chenault in ensuring that the sentencing jury be suitably guided and focused in all capital cases.

sentencing procedure permits the jury to impose the death penalty only after giving specified answers to special interrogatories, and if those interrogatories satisfactorily focus the jury's consideration on the circumstances of the offense and the offender, then the requisite guidance is achieved without explicit discussion of mitigating circumstances.[10]

10/ Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 29 L.Ed.2d 929 (1976) (plurality opinion) is illustrative of such a procedure. The Texas death penalty statute provided that if a defendant was convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. In order to impose the death penalty, the jury had to answer in the affirmative three questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the

(Footnote continued on next page).

10/ (Continued)

> death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Code Crim.Proc., Art. 37.07(b) (Supp. 1975-1976).

Despite its silence concerning mitigating circumstances, the statute survived the petitioner's eighth and fourteenth amendment attack because a plurality of the Supreme Court concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question -- despite its facial narrowness -- to permit the sentencer to consider whatever mitigating circumstances the defendant might be able to show, and that the Texas sentencing procedure appropriately guided and focused the jury's considerations. 428 U.S. at 274, 96 S.Ct. at 2957.
(Footnote continued on next page).

[6-7] In this case, the trial court's instructions[11] were devoted almost exclusively to a discussion of aggravating circumstances and their

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10/ (Continued)

In order to satisfy Lockett, of course, such a procedure could not preclude the jury from considering as a mitigating factor any aspect of the defendant's character or record or circumstances of the offense that the defendant proffered as a basis for a sentence less than death. See slip op. pp. 13147-13148, pp. _____-_____, supra.

11/ Spivey challenges the jury instructions that were given in his case, and not the facial constitutionality of the Georgia death penalty statute. That statute provides in relevant part ". . . the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law . . ." Ga. Code Ann. § 27-2534.1(b)(1) (1979). On direct appeal, the Supreme Court of Georgia first rejected Spivey's argument (Footnote continued on next page).

11/ (Continued)

that the statute required the court to single out specific mitigating circumstances and identify them in the sentencing instruction, and then held that the statute was satisfied by an instruction that would communicate to a reasonable juror that he should consider all of the facts and circumstances of the case as presented during both phases of the trial and that he could recommend life imprisonment even if he found one or more of the statutory aggravating circumstances to exist. Finally, the court found that this charge met that test. Spivey v. State, 241 Ga. 277, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978).

The state habeas court, in an unpublished opinion, understood the state Supreme Court to have "held that the trial court did not commit error even though it failed to comply with the direction of the statute and charge on mitigating circumstances." The state habeas court doubted that the state death penalty statute could withstand constitutional scrutiny if the provision requiring instruction on mitigating circumstances was not construed as mandatory. The habeas court nonetheless denied Spivey's petition because it felt compelled to follow "what the law of Georgia appears to be on this issue".

(Footnote continued on next page).

function in determining sentence. The only instructions which alluded, however implicitly or indirectly, to mitigating circumstances, or which could fairly be said to provide guidance to a juror who has found the presence of an aggravating circumstance and seeks direction on how to proceed were:

> In reaching this determination, you are authorized to consider all the evidence received by you in open Court, and both phases of the trial. You are authorized to consider all the facts and circumstances of the case.

11/ (Continued)

There is no doubt but that Spivey may challenge the jury instructions without attacking the facial constitutionality of the death penalty statute. See Washington v. Watkins, 655 F.2d at 1373-74.

and

> If you find that [aggravating circumstance] to exist, then you shall so indicate in writing, then you will determine whether or not you will impose the death penalty, and your verdict will then be one of two: "We the jury recommend the death penalty" or "We the jury do not recommend the death penalty". That is a matter for your determination, ladies and gentlemen.

This is not the clear instruction which guides and focuses the jury's consideration and which we hold the constitution requires. Neither do the instructions in any sense describe the nature and function of mitigating circumstances, nor was the jury guided toward the consideration of mitigating circumstances by special interrogatories. The charge does not begin to communicate to the jury that the law recognizes the existence of facts or circumstances

which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence.[12] Petitioner's death sentence must be set aside.

12/ In reasoning that the jury was adequately instructed on mitigation, the district court attached importance to the fact that Spivey's lawyer strenuously argued to the jury that it should consider certain mitigating circumstances in determining sentence. But "arguments of counsel cannot substiture for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-489, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978). See also, Carter v. Kentucky, ___ U.S. ___, ___ and ___ n.20, 101 S.Ct. 1112, 1121 and 1120 n.20, 67 L.Ed.2d 241 (1981).

III.

The record shows that approximately two monts before Spivey's trial, Spivey's appointed counsel, Cain, filed a motion for a "physical, neurological and psychiatric examination and determinations of the mental condition of the Defendant". On April 8, 1977, a hearing at which Cain represented Spivey was held on this motion. Spivey informed the judge that Cain's motion, to which Spivey strongly objected, violated a promise by Cain not to make any such motion without consulting Spivey. The judge replied that he was obliged, regardless of any motion, to inquire into the defendant's competency to stand trial. At the end of the hearing, Spivey announced that he would never again discuss the case with Cain

and that he wanted another attorney.

On April 15, 1977, the trial judge ordered a "physical, neurological and psychiatric examination, and determination of the mental condition of Ronald Keith Spivey on December 28, 1976 [the date of the alleged crime] and further to determine his mental capacity at this time to understand the nature of the charges against him and to assist his attorney in the defense of his case."

At trial, Dr. Smith, who examined Spivey pursuant to the April 15 order, testified for the State in rebuttal to Spivey's insanity defense. Dr. Smith testified that he saw Spivey four times in 1977, on April 18, May 2, May 3, and May 6, and that physical examinations, neurological examinations, and psychological testing were administered.

Dr. Smith testified that he found nothing physically wrong with Spivey, that Spivey had sufficient mental capacity to distinguish between right and wrong, that he was sane and that there was no indication that he was ever mentally incompetent, and that the examinations had not revealed any physical or behavioral abnormality that would support Spivey's claim that he had blackouts. In answer to a hypothetical question, Dr. Smith opined that a person could not black out and perform the goal-directed activities Spivey was alleged to have performed on the night of the crime. Finally, Dr. Smith testified that Spivey had a sociopathic personality and that such a disorder is not insanity.

In his federal habeas petition, Spivey alleged that the trial judge did not tell Spivey or Cain at any time that he intended to order an examination of Spivey's sanity at the time of the crime along with an examination of his competency for trial; that nothing in the record showed that Spivey's sanity had been put in issue at the time of the April 15 order, that the judge nonetheless ordered a sanity examination as well as a competency examination; and that at the time of the order and examination, Spivey was without counsel, since he was not speaking to Cain or any other attorney. The petition concluded that the order requiring Spivey to submit to a pre-trial sanity examination, entered without notice to Spivey at a time when he was unrepresented by counsel, deprived Spivey

of his liberty without due process and of his privilege against self-incrimination. Despite the petition's obscure invocation of the sixth amendment and its inartful intermingling of fifth and sixth amendment claims, we treat the peittion as alleging that the examination offended both the fifth and the sixth amendments, as well as the fourteenth amendment.

In his prayer for relief, petitioner prayed that the district court conduct a hearing at which proof might be offered concerning the allegations of the petition. In its order denying habeas relief, the district court concluded as a matter of law that no evidentiary hearing was warranted because Spivey had had a full and fair hearing in the state proceedings.

Turning to Spivey's contention that the psychiatric examination had violated his right to due process of law and his privilege against self-incrimination, the district court first concluded that Spivey had been represented by counsel at the time the trial court entered its order directing that an examination be conducted. The district court's opinion shows that this conclusion was based solely on the fact that the April 15 order identifies William J. Schloth as the defendant's attorney.[13]

13/ The district court's entire discussion of this point was: "Contrary to Petitioner's contentions that he was not represented by counsel at the time the aforementioned order was rendered, an examination of the order reveals that Petitioner's second defense counsel, Mr. William J. Schloth, is named therein. Thus, the record reveals that Petitioner was represented by new counsel at the (Footnote continued on next page).

The district court then found petitioner's fifth amendment claim to be without merit, citing several cases holding that the trial judge has inherent authority to inquire into an accused's competence to stand trial[14] and one case holding that a court

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13/ (Continued)

time the court entered its order directing that a psychiatric examination be had."

14/ Presnell v. State, 241 Ga. 49, 243 S.E.2d 496 rev'd in part on other grounds, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Smith v. Estelle, 445 F.Supp. 647 (N.D. Tex. 1977), aff'd 602 F.2d 694 (5th Cir. 1979), aff'd., ___ U.S. ___, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

ordered psychiatric examination to determine sanity at the time of the offense did not violate the accused's privilege against self-incrimination.[15]

On appeal, Spivey contends that it was improper for the trial court to compel a sanity examination over his objection, without notice to him of the purpose of the exam, during a time after indictment when he was not represented by counsel, and before he had raised an insanity defense. Although Spivey's brief presents the fifth amendment claim as an inchoate afterthought,[16] we take his claim to be that his privilege against

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15/ United States v. Cohen, 530 F.2d 43 (5th Cir. 1976).

16/ See n.2, supra.

self-incrimination was violated when the court-appointed psychiatrist, without advising Spivey that he had the right to remain silent and that any statement he made could be used against him at trial, and without notifying him of the purpose of the examination, interrogated Spivey while he was in custody and before he had mainfested an intention to assert an insanity defense, and then testified for the State in rebuttal to Spivey's insanity defense.

As to his sixth amendment claim, Spivey argues that he was not represented when the psychiatric examination was ordered or conducted and that without representation he was deprived of the chance to consult with counsel beforehand, so as to respond intelligently to the examination, and was deprived of the

chance to insist on safeguards for the conduct of the examination. At least, Spivey urges, the district court should have granted an evidentiary hearing on this issue.

The district court did not have the benefit of Estelle v. Smith, ___U.S.___, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) when it addressed petitioner's fifth and sixth amendment claims. In Smith, a Texas trial court had ordered a psychiatric examination to determine the competency to stand trial of a man who had been indicted for murder and against whom the State was seeking the death penalty. The man was represented by counsel. He was adjudged competent and subsequently was convicted in a jury trial. For the jury to impose the death penalty, Texas law required, among other

things, that the jury find that there was a probability that the defendant would commit future acts of criminal violence that would constitute a continuing threat to society. At the sentencing proceeding, the psychiatrist who had conducted the court-ordered examination testified that the defendant was a severe sociopath whose violent behavior would surely continue. The jury imposed the death sentence.

In an opinion by Chief Justice Burger, the Supreme Court held that the introduction into evidence of the court-appointed psychiatrist's testimony to prove future dangerousness,[17] based on

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17/ In holding that the fifth amendment pertained even after the defendant's guilt had been established, the court emphasized that the State bore the burden (Footnote continued on next page).

17/ (Continued)

of proving future dangerousness in order to secure the death penalty. 101 S.Ct. at 1874-1875.

We have viewed Smith as standing for the proposition that when a psychiatric or psychological examination is "used to determine a defendant's culpability or responsibility for the crimes charged against him, the Fifth Amendment privilege is involved because the use of °thel (sic) examination in this context may assist the State in establishing the basis for imposition of criminal punishment." Battle v. Estelle, 655 F.2d 692, 701 (5th Cir. 1981). When, as in Spivey's case, psychiatric evidence is used to establish a defendant's sanity at the time of the offense, then whether that evidence "assists the State in establishing the necessary predicate for imposing criminal punishment may turn on two factors: (1) whether the State or the defendant bears the burden of proving insanity; and (2) whether proof of insanity is inconsistent with proof of the elements of the offense charged against the accused". Id. at 701, n. 21. The law in Georgia appears to be that the defendant bears the burden of showing, by a preponderance of the evidence, that he was not mentally responsible at the time of the alleged crime. See Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978); Bryant v. State, 149 Ga. App. 777, 256 S.E.2d 52 (1979).

information gleaned from an interrogation of a defendant in custody who had neither requested the examination nor introduced psychiatric evidence on that issue,[18]

18/ The court left open the possibility that when a defendant asserts the insanity defense and introduces psychiatric testimony, he may be required to submit to a sanity examination conducted by the prosecution's psychiatrist. ___U.S.___ at ___ and ___, n.10, 101 S.Ct. at 1874 and 1874, n.10. See Battle v. Estelle, 655 F.2d at 701-02. We do not decide this question today, nor do we address whether a constitutionally significant distinction arises when, as petitioner alleges here, the defendant is first examined by a court-appointed psychiatrist and later asserts an insanity defense.

without a prior warning to the defendant that he had the right to remain silent and that any statement he made could be used against him in the sentencing proceeding, violated the rule of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Smith, ___U.S.___, ___ -___, 101 S.Ct. 1866, 1875-76, 68 L.Ed. 2d 359. See, Battie v. Estelle, 655 F.2d at 697.

The Supreme Court held that the examination procedure also violated the defendant's sixth amendment right to counsel. That right attached when the psychiatrist examined the defendant and the interview proved to be a "critical stage" of the proceedings. Id. at ____, 101 S.Ct. at 1877. Since the defendant's attorneys received no notice that the psychiatric examination

would encompass the issue of future dangerousness, their client was denied the assistance of counsel "in making the significant decision whether to submit to the examination and to what end the psychiatrist's findings could be employed." Id. Justice Stewart, joined by Justice Powell, agreed that since the examination took place without notice to defendant's counsel, the sixth amendment prohibited the introduction of the psychiatrist's testimony; he would not have reached the fifth amendment issue. Id. at 1879, (Stewart, J., concurring in the judgment). Similarly, Justice Rehnquist agreed that the defendant's attorneys were entitled to be made aware of the psychiatrist's activities involving their client and to advise and prepare the client accordingly; he too would not have reached the fifth

amendment issue. Id., (Rehnquist, J., concurring in the judgment).

Although a majority of the Supreme Court in Smith reached the fifth amendment issue,[19] the case does not require us to do so here if the appeal can be resolved on other grounds. We turn first, then, to Spivey's sixth amendment claim.

19/ Chief Justice Burger's opinion was jointed in by Justices Stevens, Brennan, White, and Blackmun. Justice Marshall joined in all of the Chief Justice's opinion, including the fifth amendment analysis, except the suggestion that the death penalty may ever be constitutionally imposed. ___U.S.___, 101 S.Ct. at 1879 (Marshall, J., concurring in part).

[8] Spivey asserts that since the April 15 order and the April 18 examination occurred during the hiatus between Spivey's dismissal of his first appointed counsel, Cain, and the assumption by his second appointed counsel, Schloth, of any responsibility in the case, Smith's sixth amendment holding requires that his conviction be set aside. If the factual predicate of Spivey's assertion is accurate, then so is his conclusion; if Spivey was required to submit to the examination without previous notice to counsel, either because he had no attorney, as his petition alleges, or because he was represented but his attorney received no notice of the April 15 order, then this case is within Smith and Spivey's sixth

amendment attack succeeds.[20] As in Smith, the psychiatrict examination here was conducted after adversary proceedings had been instituted, as Spivey had been indicted. Spivey's sixth amendment right to counsel had attached when Dr. Smith examined him and their interview proved to be a critical stage of the proceedings against petitioner.

20/ Spivey has presented yet a third variation: that even if he was represented, neither he nor counsel was provided with notice that the psychiatric examination would be to determine sanity as well as competency. In light of the unambiguous content of the trial judge's April 15 order, see slip op. p. 13152, p. ___, supra, this position is untenable.

The district court rejected petitioner's sixth amendment claim on the basis of its factual finding that Spivey was represented by Schloth starting on April 15. We hold that this finding of fact was based on an incomplete and indeterminative record and that the district court should have conducted an evidentiary hearing in order to develop a proper foundation for a factual finding.

The district court's finding was based solely on the fact that the April 15 order identified William J. Schloth as Spivey's attorney.[21] In the face of petitioner's allegation that he was unrepresented, this was an inadequate foundation for decision.

21/ See text at n.13, supra.

On point is Sloan v. Wainwright, 469 F.2d 390 (5th Cir. 1972)(per curiam), an appeal from the denial of habeas corpus relief without an evidentiary hearing. There the petitioner alleged that while the record indicated that an attorney had been appointed to represent him, he was denied the effective assistance of counsel because in fact he had not communicated with any attorney and no attorney had worked on his behalf. Concluding that the record did not provide an answer to the petitioner's assertions, we held that an evidentiary hearing was required under the teachings of Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

Sloan applied the well-settled principle that when the facts underlying a habeas corpus challenge are in dispute,

the court must hold an evidentiary hearing if the factual issue was not fully and fairly developed at the state level. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). See also, Bloodworth v. Hopper, 539 F.2d 1382 (5th Cir. 1976); Breen v. Beto, 421 F.2d 945 (5th Cir. 1970); Hayes v. Holman, 346 F.2d 991 (5th Cir. 1965). Here, the central issue of primary, historical fact[22] underlying petitioner's sixth amendment challenge is whether he was in fact represented at the time of the April 15 order and the April 18 examination.[23]

22/ See Townsend v. Sain, 372 U.S. at 309, n.6, 83 S.Ct., at 755, n.6.

23/ Whether counsel was present at the examination itself is not an issue in this case. See Estelle v. Smith, ___ U.S.___, n. 14, 101 S.Ct. at 1877, n. 14.

That issue was not developed at the state level and the record does not answer Spivey's assertions. The district court erred in refusing to conduct an evidentiary hearing. We will remand the case to the district court for an evidentiary hearing on the sixth amendment issue.[24]

IV.

In support of his contention that he was denied the effective assistance of counsel, petitioner launches a barrage of allegations attacking virtually every aspect of his attorneys' performance.[25] We reject this sixth amendment

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24/ Thus, we do not reach the fifth amendment issue, and thereby avoid deciding such questions as those intimated in note 17, supra, and note 18, supra.

25/ Spivey was represented at trial by
(Footnoted continued on next page).

challenge to Spivey's conviction, finding that the underlying allegations either have been rendered moot by our decision in Part II of this opinion, or are not properly before us or were correctly decided against Spivey by the district court.

Petitioner contends that counsel's performance during the sentencing proceeding was bankrupt in that counsel offered no mitigating evidence, failed to make appropriate objections to the proseuctor's closing argument, and himself presented a sparse and ineffective closing argument in the sentencing phase. Given our decision in Part II

25/ (Continued)

two attorneys, Schloth and Byars; the record suggests that Schloth functioned as lead counsel.

of this opinion that Spivey's death penalty cannot stand, consideration of these contentions would be superfluous. Thus, we do not address them.

[9] Petitioner further contends that his trial attorney conducted an inadequate voir dire because he did not sensitize the jury to the case he would present and that he delivered a sparse and ineffective closing argument in the guilt phase of the trial. Since petitioner makes these arguments for the first time on appeal, we do not reach them. See Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980); Messelt v. Alabama, 595 F.2d 247, 250 (5th Cir. 1979), and cases cited therein.

[10] Finally, Petitioner contends that his trial attorney did not effectively investigate, prepare, and present

Spivey's insanity defense. Before considering the merits of this contention, we note that the constitutional standard for effective assistance of counsel is:

> not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.

Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. 1978), quoting Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974).

The record belies petitioner's suggestion that counsel "stood still and did nothing" about the insanity defense. Counsel questioned prospective jurors during voir dire and their views on the insanity defense, and then indicated in his opening statement that an insanity defense would be presented. He

examined at some length a psychologist whose testimony supported Spivey's insanity defense. He examined at even greater length Spivey, who testified about his troubled childhood, his medical history, the diagnoses of physicians who treated him, and his history of blacking out and committing violent acts when upset. He examined an acquaintance of Spivey who testified that following violent episodes Spivey was unable to recall what he had done. Finally, counsel's closing argument in the guilt phase of the trial focused on the insanity defense.

Spivey nonetheless maintains that counsel's presentation of the insanity defense was ineffective. Spivey's chief complaint appears to be that his attorney did not call certain witnesses

who, Spivey alleges, would have buttressed his insanity defense. This charge was raised in the state habeas proceeding, where the court concluded that Spivey had made no showing as to what testimony these witnesses might have given that would have established any defense for him. We conclude that the district court properly relied on the state habeas court's factual determination of this issue.

[11] The federal habeas corpus statute provides that when a state court has made a determination after a hearing on the merits of a factual issue, that determination shall be presumed correct by a federal court on habeas unless the petitioner is able to show the existence of one of seven

enumerated circumstances, such as a defect in the state fact-finding procedure that rendered it inadequate to afford a full and fair hearing, or unless the factual determination is not fairly supported by the record; and the petitioner can overcome the presumption of correctness only by establishing by convincing evidence that the state factual determination was erroneous. 28 U.S.C. § 2254(d).

Here, the state habeas court found that Spivey had not carried his burden of showing how the uncalled witnesses would have helped him. The record shows that this finding followed a hearing at which petitioner had every

opportunity to present evidence in support of his contentions.[26] No contention was made in the district court that the state proceeding had been less than full and fair or in any other way did not comport with the conditions

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26/ Spivey suggested at oral argument that the reason for his inadequate showing in the state habeas court was that his attorney there, who was not his trial attorney, ineffectively represented him. Since petitioner raises this contention for the first time on appeal, it is not properly before us. See slip op. p. 13156, p. ____, supra.

of 28 U.S.C. § 2254 to raise the presumption of correctness. Finally, the state court's determination is fairly supported by the record. Therefore, the state court's finding was presumptively correct and the district court was justified in holding that counsel was not shown ineffective by his failure to call witnesses when there was no showing what they would say.[27]

27/ The district court actually found that "the witnesses Petitioner desired to testify at his trial would not have been able to provide any probative evidence." In these words, the finding goes further than the state court's finding did and than the record justifies. However, the district court's finding clearly encompasses the permissible and justified finding that Petitioner had not shown that the witnesses would have been able to provide probative evidence.

[12] We are able to dispose more summarily of petitioner's other allegations in support of his contention that counsel ineffectively prepared and presented the insanity defense. Petitioner asserts that because of counsel's abrupt shift after the jury voir dire from a defense based on diabetes to a defense based on psychiatry, a jury primed for evidence about a diabetic defendant instead heard an insanity defense. This assertion is simply not supported by the record, which shows that the jurors were questioned as much or more about their views on the insanity defense than they were about their knowledge of diabetes.[28]

28/ Furthermore, the questions about diabetes typically asked in the voir (Footnote continued on next page).

Finally, petitioner asserts that counsel did not adequately investigate a possible defense that Spivey had been mixing tranquilizers and alcohol on the day of the offense. Even if counsel did inadequately investigate this defense, a finding which we do not make here, we would hold that in light of the constitutional standard for effective assistance of counsel, see slip op. p. 13156, p. ___, supra, and in light of counsel's reasonably effective presentation of the insanity defense, the district court did not err in finding

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28/ (Continued)

dire ("Are you a diabetic? Is anyone in your family or anyone you are close to a diabetic? Do you know anything about a glucose tolerance test? Do you know anything about diabetic behavior, how diabetics react?") would not likely have suggested that a diabetes defense was going to be presented.

that the petitioner received the effective assistance of counsel.

V.

We affirm so much of the district court's judgment as held that petitioner was not deprived of the effective assistance of counsel. We vacate so much of the district court's judgment as held that the mental status examination did not violate petitioner's rights under the fifth, sixth, and fourteenth amendments and remand for an evidentiary hearing to determine whether petitioner was represented by counsel at the time of the April 15 order and the subsequent examination. Having made the requisite factual findings, the district ccurt will rule on the sixth amendment claim consistent with Part III of this opinion.

In addition, the district court will reconsider petitioner's fifth amendment claim in light of Smith and Battle, supra. In order to expedite the final disposition of this case, we will retain jurisdiction and instruct the district court to certify its findings and the record of its proceedings on remand to us within forty-five days of the issuance of this opinion so that we may review the district court's judgment.

We reverse so much of the district court's judgment as held that the state trial court's sentencing instructions were constitutionally adequate. If petitioner's fifth and sixth amendment challenges to his conviction ultimately fail, then we will direct the district court to issue its writ providing for the state of Georgia to determine within

a reasonable time whether to conduct a new sentencing proceeding in the manner provided by state law or to vacate petitioner's sentence and impose a sentence less than death in accordance with state law.[29]

29/ See Estelle v. Smith, ___U.S.___, ___, 101 S.Ct. 1866, 1878 (1981)("the state is free to conduct further proceedings not inconsistent with this opinion."); Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977)(plurality opinion).

AFFIRMED in part; VACATED and REMANDED in part; REVERSED in part.

FAY, Circuit Judge, specifically concurring:

Judge Tjoflat accurately sets forth the opinions of the Supreme Court of the United States dealing with state statutes allowing the death penalty and appropriate consideration of mitigating circumstances. Lockett and Bell, along with our opinion in Chenault, require instructions which do not preclude consideration of mitigating factors and which allow objective consideration of the particularized circumstances of the individual offender. In my opinion, however, this does not require the trial judge to specifically list each and every conceivable mitigating circumstance

that counsel may suggest either during trial or on appeal. But, we are bound by Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), unless and until it is altered by the en banc court. As Judge Coleman points out in his dissent in Washington, the trial judge is damned if he does and damned if he doesn't. In this case, as in Washington, defense counsel was allowed to argue anything and everything he considered important or mitigating. In both instances, the juries were told to consider all of the evidence -- all of the circumstances -- aggravating and mitigating. This should be sufficient.

In addition, this issue, along with others, has twice been presented to the Supreme Court and rejected. It is no wonder our citizens are losing

faith in the judicial process. Capital cases are unique. The responsibilities of the courts and the attorneys are awesome. Fairness to both the defendants and society demands that all courts set forth the rules and requirements in clear simple terms. In my opinion, Mr. Spivey received a fair trial and has been found guilty of aggravated heinous crimes. If death penalty statutes are constitutional, it is our sworn duty to enforce them regardless of our personal feelings. As stated by Justice Rehnquist in his dissent in Washington v. Spenkelink, 442 U.S. 901 at 904, 99 S.Ct. 2421 at 2422, 60 L.Ed.2d 1075, "Constant and repeated frustration of the State's lawful action in such a situation is contrary to the underlying assumptions of our federal system."

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *

UNIT B

NO. 80-7243

RONALD K. SPIVEY,

Petitioner-Appellant,

versus

WALTER ZANT, Warden,
Georgia Diagnostic
and Classification
Center,

Respondent-Appellee.

- - - - -

Appeal from the United States District Court for the Middle District of Georgia

- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 16, 1981, 5 Cir., 198_, _____F.2d_____).

January 5, 1982

* Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452 - October 14, 1980)

Before DYER, TJOFLAT and FAY, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of

said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure, Local Fifth Circuit Rule; Fifth Circuit Judicial Council Resolution of Jaunary 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Gerald B. Tjoflat
United States Circuit
Judge

Opposition

Office - Supreme Court, U.S.
FILED
JUN 1
ALEXANDER L. STEVAS,
CLERK

No. 81-1875

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WALTER ZANT, Warden, Georgia Diagnostic and Classification Center,

Petitioner,

v.

RONALD K. SPIVEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 81-1875

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WALTER ZANT, Warden, Georgia Diagnostic and Classification Center,	)
Petitioner,	)
v.	)
RONALD K. SPIVEY,	)
Respondent.	)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, panel B (now the Eleventh Circuit), is reported at 661 F 2d 464, and is included as Appendix 1 to the Petition for a Writ of Certiorari. The opinion of the United States District Court for the Middle District of Georgia, Columbus Division, is unreported.

Jurisdiction

This case is still pending in the court of appeals. The court of appeals has not entered final judgment. Nevertheless, this Court has the authority to assert jurisdiction pursuant to 28 U.S.C. § 1254(1).

Question Presented

Was the court of appeals correct in holding that the Eighth and Fourteenth Amendments, as interpreted by this Court, require trial courts in death penalty cases to instruct the jury about mitigating circumstances and the option to recommend against death?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Georgia Code Annotated § 27-2534.1:

> 27-2534.1 Mitigating and aggravating circumstances; death penalty
>
> (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
>
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Section 27-2534.1(b) is so found, the death penalty shall not be imposed.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

In a four-day trial in June, 1977, respondent Ronald K. Spivey was convicted of one count each of murder and kidnaping and two counts each of aggravated assault and armed robbery. Following the return of the jury's verdicts

of guilty, the trial court conducted a sentencing hearing before the same jury with respect to the murder convictions.

At the close of the sentencing hearing, the trial judge instructed the jury in detail about the aggravating factor -- murder while in the perpetration of an armed robbery -- proposed by the prosecution in support of the death penalty. (A copy of the complete sentencing instruction is attached as Appendix A.) See Appendix A at 779-80. However, the court did not inform the jury of its duty to consider mitigating evidence and did not describe the relationship between aggravating and mitigating circumstances. Nor did the court direct the jury's attention to evidence of Spivey's extensive mental problems and psychiatric history, a mitigating factor it could properly have considered. The court also did not clearly instruct the jury of its option to recommend life even if it found a statutory aggravating circumstance. The trial judge merely advised the jury that, in determining punishment, "you are authorized to consider all of the evidence received by you in open court, and both phases of the trial. You are authorized to consider all the facts and circumstances of the case." Appendix A at 779. The jury recommended a sentence of death. Appendix A at 781. Spivey was thereafter sentenced to death.*/

On direct appeal the Supreme Court of Georgia affirmed Spivey's conviction and sentence, Justices Hill and Marshall dissenting. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039 (1978). In affirming the conviction and sentence, the Georgia Supreme Court

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*/ The trial judge, also sentenced Spivey to 20 years on the kidnaping charge, ten years for each assault charge, and life imprisonment on the armed robbery charges.

specifically ruled that sufficient mitigating evidence of Spivey's mental disability had been presented:

> There was evidence introduced during the trial that would have authorized the jury to find that Spivey committed the murder while under the influence of extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct with requirements of the law was substantially impaired.

Id. at 290. This Court denied certiorari, Justices Brennan and Marshall dissenting. 439 U.S. 1039 (1978).

On February 7, 1979, Spivey filed a petition for a writ of habeas corpus in the Butts County Superior Court of the State of Georgia. The Honorable R. Alex Crumbley denied the petition on March 12, 1979.*/ The Georgia Supreme Court denied Spivey's application for a certificate of probable cause to appeal on April 24, 1979, Justices Bowles and Marshall dissenting. This Court denied certiorari on November 13, 1979, Justice Brennan dissenting. 444 U.S. 957 (1979).

---

*/ Judge Crumbley stated that he considered the instruction in Spivey's case to be in direct conflict with the Georgia statutory requirement to instruct on mitigating circumstances. However, he refused to issue the writ because he believed that he was bound by the interpretations of the Georgia Supreme Court. He stated:

> It is this Court's view that the Georgia death penalty statute may well not be able to withstand constitutional scrutiny under Gregg v. Georgia, supra, Lockett v. Ohio, supra, and other cases if the provision in the statute that the Court should charge on mitigating circumstances is not construed as being mandatory. To sanction the charge in Petitioner's case is to authorize a judicial repeal of the language of the statute which requires that the jury be instructed on mitigating circumstances. However, this Court is compelled to follow what the law of Georgia appears to be on this issue. Accordingly, the Court must deny Petitioner's claim for relief.

Order of March 12, 1979, at 6.

On December 20, 1979, Spivey filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia pursuant to 28 U.S.C. § 2254. The Honorable J. Robert Elliott denied the petition on February 29, 1980. On November 16, 1981, the Court of Appeals for the Fifth Circuit, panel B (now the Eleventh Circuit), issued an opinion deciding some of the issues in Spivey's appeal and remanding for an evidentiary hearing on certain factual questions. Pet. App. at 67-69. The court of appeals did not issue a final order; rather, the court expressly retained jurisdiction over the case to adjudicate the remaining issues. Id. The State's petition for rehearing with a suggestion for rehearing en banc was denied by the court of appeals on January 5, 1982.

B. Present Status of Appeal in the Court of Appeals

In his habeas corpus petition and his appeal to the court of appeals, Spivey maintained that his conviction should be reversed because: (1) he received ineffective assistance of counsel; and (2) he was compelled to submit to a pre-trial psychiatric examination in violation of the Fifth, Sixth and Fourteenth Amendments. In addition, Spivey asserted that his death sentence should be vacated because: (1) the sentencing instruction violated the Eighth and Fourteenth Amendments; (2) the prosecutor engaged in misconduct; (3) a venireman was improperly excluded for cause; and (4) he received ineffective assistance of counsel.

The court of appeals ruled that the sentencing instruction in Spivey's case violated the Eighth and Fourteenth Amendments because it failed to provide clear guidance and failed to focus the jury's consideration. Pet. App. at 33. Accordingly, the court stated that Spivey's death sentence must be set aside. Id.

Contrary to Zant's assertion, however, the court of appeals did not "grant[] Respondent habeas relief in the form of an order vacating Respondent's sentence of death." Petition at 11. Rather, the court made the issuance of an order vacating the death sentence contingent upon the ultimate disposition of Spivey's challenge to his conviction on Fifth, Sixth, and Fourteenth Amendment grounds. Id. at 68-69.

The court of appeals expressly retained jurisdiction over Spivey's appeal. The case was remanded to the district court for an evidentiary hearing on Spivey's claim that the state's use of testimony derived from pre-trial psychiatric examinations rendered his conviction unconstitutional under the Fifth and Sixth Amendments. Id.*/ The court of appeals instructed the district court to conduct the evidentiary hearing and to certify its findings back to the court of appeals within 45 days. Id.

The district court held an evidentiary hearing on December 9, 1981. On December 28, 1981, the district court issued its opinion and order rejecting Spivey's Fifth and Sixth Amendment claims. The record was returned to the court of appeals.

On March 5, 1982, the court of appeals ordered the parties to file supplemental briefs on the Fifth and Sixth Amendment issues. Spivey filed his opening supplemental brief on May 7, 1982. Warden Zant's supplemental brief is due on June 10, 1982. Spivey's reply brief is due on June 28,

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*/ The court ruled that Spivey's claims of ineffective assistance of counsel were either moot, or were not properly before the court, or were correctly decided by the district court. Pet. App. at 56-57. The court did not reach Spivey's challenges to his death sentence on the grounds (1) that the prosecutor's argument to the jury during the sentencing phase was improper and prejudicial and (2) that the trial court's dismissal for cause of a particular venireman was improper. Pet. App. at 4-5.

1982. The court of appeals has not yet set a date for oral argument.

REASONS FOR DENYING THE PETITION

Contrary to Supreme Court Rule 18, the State through its representative, Warden Zant, has not even attempted to show why this Court should review this case while it is still pending before the court of appeals. Zant has also failed to support his claim that a conflict exists between the decisions of the court of appeals and the Georgia Supreme Court. In any event, the court of appeals' ruling is mandated by prior decisions of this Court and thus does not present an issue warranting this Court's review.

I. THE PETITION SHOULD BE DENIED PURSUANT TO RULE 18 BECAUSE THE COURT OF APPEALS HAS NOT YET RENDERED JUDGMENT IN THIS CASE.

This case is still pending in the court of appeals. As noted above, the court of appeals retained jurisdiction to review the district court's judgment following the evidentiary hearing on remand. Pet. App. at 68. The court of appeals did not issue a final order with respect to the sentencing instruction.*/ Rather, the court stated that it would direct the district court to issue a writ of habeas corpus vacating the death sentence if Spivey's challenge to his conviction ultimately fails. Id. at 68-69.

Rule 18 of the Supreme Court Rules provides:

> A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from

*/ If judgment had been entered by the court of appeals, then, pursuant to Fed. R. App. P. 41(a), the mandate should have issued. No mandate issued. The State did not seek a stay of the mandate pending application for certiorari in accordance with Fed. R. App. P. 41(b).

> normal appellate practice and to require immediate settlement in this Court.

Zant has not addressed this requirement. Consequently, he has not shown the special circumstances required by the rule. No facts are set forth in the petition that even implicitly make such a showing.

A comparison of this case with those cited in Rule 18 shows that immediate resolution is not warranted in this case. For example, in United States v. Nixon, 418 U.S. 683 (1974), the Court reviewed the denial of the President's motion to quash a subpoena in the pending "Watergate" prosecution. Id. at 686-87. The urgency and importance of a speedy and final resolution of the issue were self-evident.*/

Spivey's case, in contrast, presents no elements of urgency. An adjudication by this Court would not affect the issues in the court of appeals and would do nothing to further the interests of justice. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) (review of Presidential order directing seizure and operation of steel mills); Ex Parte Quirin, 317 U.S. 1, 19 (1942) (public importance of espionage charges justified granting leave to file habeas corpus petitions and hearing oral argument at special term of Court); Norman v. Baltimore & Ohio Railroad, 294 U.S. 240, 243 (1935) (review of Congressional power to invalidate gold clauses in private money contracts).

Emergency review by this Court would not affect Spivey's status. Even if this Court were to decide the sentencing issue on an expedited basis, the court of appeals

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*/ Certiorati was granted on May 31, 1974, and June 15, 1974. 417 U.S. 927 and 960. The case was argued on July 8, 1974, and decided on July 24, 1974. 418 U.S. 683, 683 (1974).

would have to complete its consideration of Spivey's challenge to his conviction before further state court proceedings would be in order.

II. PETITIONER HAS NOT SHOWN ANY CONFLICT IN THE SENSE CONTEMPLATED BY RULE 17.

Citing Supreme Court Rule 17.1(a), Warden Zant claims that a conflict exists between the decision of the court of appeals below and various decisions of the Supreme Court of Georgia. Pet. at 16. However, the only conflict that Zant has shown is a disagreement between the courts about the proper disposition of this case. Such a disagreement is not the kind of conflict contemplated by Rule 17.1(a) as a reason for granting the writ.

Without any discussion, Zant cites nineteen cases and Spivey v. State for the proposition that this case presents "a clear and direct conflict" between the Fifth Circuit and the Supreme Court of Georgia. Pet. at 16-17. Seven of the cases cited by Zant do not even mention a sentencing instruction issue and thus cannot establish the existence of a conflict.*/

In seven of the remaining cited cases, the only reference to a sentencing issue is the perfunctory conclusion that "the charge was not subject to the defects dealt with in Fleming v. State . . . and Hawes v. State.**/ In these seven cases, the Georgia Supreme Court does not even

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*/ Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977); Gaddis v. State, 239 Ga. 238, 236 S.E.2d 594 (1977); Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977); Gibson v. State, 236 Ga. 874, 226 S.E.2d 63 (1976); Dobbs v. State, 236 Ga. 427, 224 S.E.2d 3 (1976); Goodwin v. State, 236 Ga. 339, 223 S.E.2d 703 (1976); Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974).

**/ Cunningham v. State, 248 Ga. 558, 284 S.E.2d 390, 396 (1981) ("The trial court's written charge to the jury during

(Footnote continued on following page.)

discuss the contents of the disputed instructions or indicate in what way the charges were allegedly defective. Accordingly, the opinions in fourteen cases cited by Zant are not in conflict with the Fifth Circuit's opinion in this case.

In four of the remaining cases cited by Zant, the Georgia Supreme Court indicates that the instructions given -- in stark contrast to those in Spivey -- provided specific guidance on mitigating circumstances and the option to recommend a life sentence even if an aggravating circumstance is found.*/ Thus, if anything, these four opinions conform with the court of appeals' opinion in this case. They are not in conflict with it.

(Footnote continued from previous page.)

the sentencing phase of the trial was not subject to the defects dealt with in Fleming v. State, supra, and Hawes v. State, 240 Ga. 327 240 S.E.2d 833 (1978)."); High v. State, 247 Ga. 289, 276 S.E.2d 5, 14 (1981) ("We have thoroughly reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1978) and Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1978)".); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, 555 (same); Hill v. State, 246 Ga. 402, 271 S.E.2d 802, 810 (1980) (same); Baker v. State, 243 Ga. 710, 257 S.E.2d 192, 194 (1979) (same); Finney v. State, 242 Ga. 582, 250 S.E.2d 388, 393 (1978) ("We note, also, that we have reviewed the trial court's charge to the jury during the presentence hearing, and it is in compliance with Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978)); Morgan v. State, 241 Ga. 485, 246 S.E.2d 198, 200 (1978) ("We find no error in the trial court's charge to the jury relating to the sentencing phase of the trial. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978).").

*/ Cervi v. State, ___ Ga. ___, 282 S.E.2d 629, 636-637 (1981) ("A definition of mitigating circumstances was contained in the material [sent to the jury], and the form specifically provided for the imposition of a life sentence even though the jury found the existence of aggravating circumstances."); Waters v. State, 248 Ga. 355, 283 S.E.2d 238, 251 (1981) ("Here the charge included application of mitigating circumstances and informed the jury they could recommend life sentences even if they found the existence of a statutory aggravating circumstance."); Collier v. State, 244 Ga. 553, 261 S.E.2d 364, 376 (1979) ("The trial court

(Footnote continued on following page.)

In the last case cited by Zant, the Georgia Supreme Court affirmed the grant of a writ of habeas corpus because the sentencing instruction failed to "inform the reasonable juror that he could recommend life imprisonment even if he should find the presence of one or more of the statutory aggravating circumstances." Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219, 222 (1981). The court however, reversed the lower court's finding that the charge failed properly to instruct on mitigating circumstances. Citing and quoting Spivey v. State, the court reiterated its position that an instruction to consider all the facts and circumstances of the case necessarily includes mitigating circumstances and provides sufficient guidance to the jury. 279 S.E.2d at 222. Because the Gaddis instruction was in form identical to the Spivey instruction, however, the Georgia Supreme Court's opinion on this point merely repeats its prior ruling in Spivey v. State.*/ See Charge of the Court on Punishment, State v. Gaddis, a copy of which is attached as Appendix B. Thus, with the exception of the

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(Footnote continued from previous page.)

charged that the jury was to 'consider all the evidence submitted in both phases of the trial in arriving at your verdict, including any and all evidence of mitigating circumstances.'"); Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524, 528-29 (1978) ("the trial court charged the jury that one of their possible verdicts was: 'We, the jury, find the defendant guilty . . . the following statutory aggravating circumstance or circumstances, having been found by the jury, to-wit . . . and we recommend mercy or that the defendant's punishment be life imprisonment.'" [case did not present issue of failure to instruct on mitigating circumstances]).

*/ If anything, Zant v. Gaddis demonstrates a conflict between different decisions of the Georgia Supreme Court. The instruction in Spivey does not inform the reasonable juror of his option to recommend life despite aggravating circumstances any more than in Gaddis. Compare Appendix A with Appendix B. Yet the Georgia Supreme Court ruled that Spivey's instruction was sufficient on this point, Spivey v. State, 246 S.E.2d 288, 291 (1978), and that the Gaddis instruction was deficient, 279 S.E.2d at 222.

opinion of the Georgia Supreme Court in this case -- partially repeated in Zant v. Gaddis --none of the cases cited by Zant support his claim that a conflict exists.

The simple disagreement between a state court and a federal court of appeals in the same case is not the type of conflict contemplated by Rule 17 or by the decisions of this Court. Rule 17.1(a) states in pertinent part that a special and important reason for granting the writ of certiorari might exist "[w]hen a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort." If this rule were meant to apply to the conflict between a federal court of appeals and a state supreme court in the same case, every case in which a federal court grants a writ of habeas corpus pursuant to 28 U.S.C. § 2254 would manifest this special and important reason for granting a writ of certiorari. Such an interpretation would render Rule 17.1(a) meaningless.

This Court's decisions establish that the conflict contemplated by Rule 17 is one in which several federal and state courts are in conflict, not in the same case, but with respect to the correct interpretation of federal law. See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 674 (1979) (certiorari granted in state and federal cases to resolve conflict between state and federal courts as to interpretation of important treaty provision); Scott v. Illinois, 440 U.S. 367, 368 (1979) (certiorari granted to resolve conflict among state and federal courts regarding proper application of Argersinger v. Hamlin); Franks v. Delaware, 438 U.S. 154, 161 (1978) (certiorari granted to resolve conflict among both state and federal courts concerning challenge to veracity of sworn police statements in support of warrants).

Zant's failure to demonstrate any conflict as envisioned by Rule 17 renders the petition devoid of any reason for granting the writ. It should, therefore, be denied.

III. THE COURT OF APPEALS' DECISION WAS CONSISTENT WITH AND MANDATED BY THE DECISIONS OF THIS COURT.

The instruction in Spivey's case began with an introductory statement that the jury is to determine punishment. In so doing, the jury was "authorized to consider all of the evidence received by you in open Court. You are authorized to consider all the facts and circumstances of the case." Appendix A at 779. The instruction then provides a detailed discussion of the aggravating circumstances proffered by the State and informs the jury of its option to recommend the death sentence. Id. Nowhere, however, does the instruction contain any guidance on the duty to consider mitigating evidence or the option to recommend life despite the presence of an aggravating circumstance. The court of appeals determined that this instruction did not communicate to the jury "that the law recognizes the existence of facts or circumstances which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence." Pet. App. at 33-34.

In its opinion, the court of appeals followed the decisions of this Court interpreting the Eighth Amendment requirement that the jury be clearly instructed on mitigation and its option to recommend against death. Id. at 14-34. The court of appeals held that the Eighth and Fourteenth Amendments require that jury instructions guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender. Id. at 24-25 (quoting Jurek v. Texas, 428 U.S.

262, 274 (1976)). The court added that in most cases this will mean "that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." Id.

In Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), this Court reiterated that, in seeking the death penalty, the state must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" to the jury. As the Court previously had recognized in reviewing Georgia's death penalty statute, it would be "virtually unthinkable" for a jury to decide whether a man should live or die without "careful instructions on the law and how to apply it." Gregg v. Georgia, 428 U.S. 153, 193 (1976) (plurality opinion). In Gregg this Court approved Georgia's capital sentencing statute only because it read the statute to "requir[e]" the trial judge to "include in his instructions to the jury 'any mitigating circumstances . . . which may be supported by the evidence.'" 428 U.S. at 164.*/

In Spivey's case the arbitrary process that this Court considered "virtually unthinkable" in Gregg became a stark reality. Despite what the Georgia Supreme Court found

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*/ The Court's reading of this requirement was based on the clear language of the statute. In addition, at oral argument in Gregg the Assistant Attorney General of Georgia assured this Court that Georgia juries would be instructed in writing on the mitigating circumstances. He stated:

> The statute requires that the trial court determine from the evidence presented what statutory aggravating circumstances are warranted. He then gives those in [the] charge to the jury and any mitigating [circumstances] that [are] presented or warranted by the evidence. These are also given to the jury in writing.

Transcript of Oral Argument in Gregg v. Georgia at 18. (A copy of this transcript is attached as Appendix C.)

to be sufficient evidence of a mitigating factor -- Spivey's mental disability -- the jury that sentenced Spivey to death was not informed by the trial judge that it could consider his disability as a mitigating factor. The jury was not even instructed that it could apply factors of mitigation in determining punishment.

Instead the jury was given a charge that fully described the aggravating factor urged by the prosecution and otherwise was told only that it "was authorized" to consider "all the facts and circumstances of the case." Any decision upholding the constitutionality of this instruction would directly contradict the Eighth Amendment requirement that the jury receive specific and detailed guidance. Under Gregg and its progeny, the trial court was required to direct the jury to consider mitigating circumstances, including Spivey's mental disability, and to instruct the jury that it could recommend life imprisonment even if it found the existence of an aggravating factor.

Zant's argument that the court of appeals "stated that it has read into these opinions [Gregg, Jurek, Woodson, Lockett, and Bell] the requirement that a trial court recite a magic litany of words in apprising the jury of their authority to consider the facts particular to the offender and the circumstances of the offense in reaching their defense on punishment," Pet. at 23, is a gross misstatement of the court's opinion. Spivey has never argued -- and the court of appeals did not hold -- that the Eighth Amendment requires the trial court to use any particular words in instructing the jury with respect to mitigating circumstances. See Pet. App. at 14-34. To the contrary, the court of appeals held that the Constitution does not

require the use of the words "mitigating circumstances."*/ Id. at 25 n.8. The court added:

> So long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment, Coker v. Georgia 433 U.S. 584, 590-91, this portion of the constitutional requirement is satisfied.

Id. Zant's reference to a "magic litany" simply has nothing to do with the decision by the court of appeals in this case.

The trial court's failure to provide any guidance to the jury on circumstances which may be considered as extenuating or reducing the level of moral culpability required reversal of Spivey's death sentence. Because the court of appeals correctly ruled on this issue, the petition should be denied.

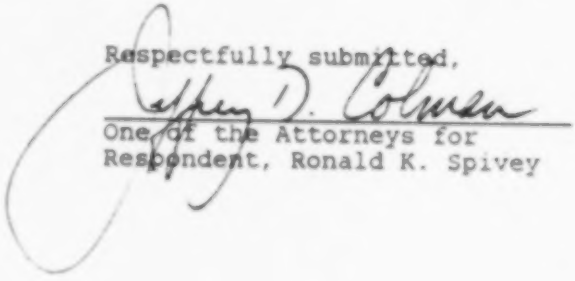
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*/ This statement by the court of appeals also contradicts Zant's assertion that the court required "that a trial court must define 'mitigating circumstances.'" Pet. at 23. When the court stated that the "judge will normally tell the jury what a mitigating circumstance is," it added footnote 8, stating that the Constitution does not require the use of the words "mitigating circumstances." Pet. App. at 25.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,



One of the Attorneys for
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May 27, 1982

No. 81-1875

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WALTER ZANT, Warden, Georgia Diagnostic and Classification Center,

Petitioner,

v.

RONALD K. Spivey,

Respondent.

CERTIFICATE OF SERVICE AND MAILING

I, Jeffrey D. Colman, a member of the Bar of the Supreme Court of the United States, certify that on May 27, 1982, I caused 40 copies of the Brief in Opposition to Petition for a Writ of Certiorari to be mailed by prepaid, first class postage to the Clerk of the Supreme Court of the United States.

I further certify that in compliance with Rule 28.3 of the Rules of the Supreme Court I caused to be mailed by first class, prepaid postage 3 copies to: Mr. William B. Hill., Jr., Assistant Attorney General of the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30303.

Jeffrey D. Colman

Subscribed and Sworn
to before me this 27th
day of May , 1982.

Lynne 3 Braver
Notary Public

Appendix

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Appendix A: Sentencing Instruction in State v. Spivey

Appendix B: Sentencing Instruction in State v. Gaddis

Appendix C: Excerpt from Oral Argument in Gregg v. Georgia, No. 74-6257

APPENDIX A

Sentencing Instruction in State v. Spivey

CHARGE OF THE COURT

Ladies and gentlemen, you have found the defendant guilty of the offense of murder. It is now your duty to determine, within the limits prescribed by law, the penalty that shall be imposed as punishment for that offense. In reaching this determination you are authorized to consider all of the evidence received by you in open Court, and both phases of the trial. You are authorized to consider all the facts and circumstances of the case.

Under the laws of this State, every person guilty of the offense of murder, shall be punished by life in the penitentiary, or death by electrocution.

I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances, as I will define to you later in the charge, sufficient to authorize the supreme penalty of the law.

I charge you that a finding of statutory aggravating circumstance shall only be based upon evidence convincing your mind beyond a reasonable doubt as to the existence of one, or of the factual condition in connection with the defendant's perpetration of acts for which you have found him guilty.

Now, the law provides certain aggravating

APPENDIX A

circumstances which you may consider for this purpose. If the offense of murder was committed while the offender was engaged in the crime of another capital felony, in this case, the capital felony charged by the State is that of armed robbery, I have given you in charge, you have received the definition of armed robbery.

The statutory instructions that you are authorized to consider will be submitted in writing to you the jury for your consideration. If you fix his punishment as death, you must also designate in writing that aggravating circumstance which you find beyond a reasonable doubt.

Your verdict must be agreed to by all twelve of your members, it must be in writing, entered upon the indictment, dated and signed by your foreman, and returned in to Court for publication.

You may retire and begin your deliberations, after you have received the indictment and documentad evidence adduced in the pre-sentence hearing, and then determine the penalty or punishment that shall be imposed in this case. You must first consider and find beyond a reasonable doubt that the aggravating circumstance, or the murder happening while in the perpetration of another capital felony, armed robbery; armed robbery is a capital felony, you must find that beyond a reasonable doubt.

If you find that to exist, then you shall so

indicate in writing, then you will determine whether or not you will impose the death penalty, and your verdict then will be one of two: "We the jury recommend the death penalty," or "We the jury do not recommend the death penalty." That is a matter for your determination, ladies and gentlemen.

You will have this in writing to carry out with you to assist you in preparation of your verdict. You may retire at this time and fix punishment in this case.

(At 2:33 o'clock p.m., the jury retires to the jury room to begin deliberations.)

(The jury returns to the Courtroom.)

THE COURT: Mr. Foreman, ladies and gentlemen, have you reached a verdict as to punishment?

THE FOREMAN: We have, Your Honor.

MR. WHISNANT: "We the jury find the following aggravating circumstance; the offense of murder was committed while the offender was engaged in commission of a capital felony, to wit: armed robbery, we the jury recommend the death penalty, this 30th day of June, 1977, John D. Stewart, Foreman."

MR. SCHLOTH: It's in order, Your Honor.

THE COURT: Ladies and gentlemen, there will be a short delay. You may be comparatively at ease, but I want the Courtroom to remain in order.

Let Mr. Spivey and attorneys come forward, please.

APPENDIX B

Sentencing Instruction in State v. Gaddis

IN THE SUPERIOR COURT OF JEFFERSON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	Indictment No. 23: Burglary
VS.	Indictment No. 24: Burglary
BILLY SUNDAY BIRT,	Indictment No. 25:
BOBBY GENE GARDIS,	Count One: Armed Robbery
CHARLES DAVID REED, and	Count Two: Armed Robbery
WILLIAM EUGENE OTWELL,	Indictment No. 26:
Defendants.	Count One: Armed Robbery
	Count Two: Armed Robbery
	Indictment No. 27:
	Count One: Murder
	Count Two: Murder

CHARGE OF THE COURT ON PUNISHMENT

All right, ladies and gentlemen, you having found the def. dant guilty of the offenses of murder and armed robbery, it is your duty to determine within the limit prescribed by law, the alty that shall be imposed as punishment for each of those off. in the respective indictments. In reaching this determination you are authorized to consider all of the evidence received by in open court in both phases of the trial of all cases. You a. authorized to consider all the facts and circumstances of the heretofore submitted to you. Under the law of this State, eve. person guilty of the offense of murder shall be punished by li.

the penitentiary or death by electrocution.

Under the laws of this State, every person guilty of the fense of armed robbery shall be punished by life in the penit. or death by electrocution, or by confinement in the penitenti for a period of not less than one year and not more than twen. years.

In the event that your verdict is life imprisonment, ... of the charges under consideration by you, the punishment the dant would receive would be imprisonment in the penitentiary and during the remainder of his natural life. If that is you. dict, you would add to the verdict, already found by you, an tional verdict as follows: "and we fix his punishment at life imprisonment."

You may, however, if you see fit, and if that be your ve. fix his punishment as for death, which would require a senten the Court of death by electrocution.

I charge you that before you would be authorized to find verdict fixing a sentence of death by electrocution, you must evidence of statutory, aggravating circumstances, as I will c. to you later in the charge, sufficient to authorize the supre. penalty of the law.

I charge you that a finding of statutory, aggravating ci. stance, or circumstances, shall only be based upon evidence c. vincing your minds, beyond a reasonable doubt and to the excl. of every other reasonable hypothesis, as to the existence of

more of the following factual conditions in connection with the defendant's perpetration of the act for which you have found hi. guilty in each instance. They are:

Aggravating circumstance number one: The offense of murde was committed while the offender was engaged in the commission another capital felony, armed robbery, or the offense of murder was committed while the offender was engaged in the commission the offense of burglary.

Aggravating circumstance number two: The offense of armed robbery was committed while the offender was engaged in the com sion of another capital felony, murder, or the offense of armed robbery was committed while the offender was engaged in the com sion of the offense of burglary.

Aggravating circumstance number three: The offense of mur was outrageously or wantonly vile, horrible or inhumane, in the involved torture or depravity of mind.

Aggravating circumstance number four: The offense of armed robbery was outrageously or wantonly vile, horrible or inhumane that it involved torture or depravity of mind.

Aggravating circumstance number five: The offender commi the offense of murder for himself or another, for the purpose o receiving money or any other thing of monetary value.

Aggravating circumstance number six: The offender caused directed another to commit murder or committed muder as an agen or employee of another person.

The statutory instructions that you are authorized to c will be submitted to you in writing to be used by you in your liberations. If your verdict would be a recommendation of d you would add to the verdict already found by you an additio verdict as follows: "and we fix punishment as death."

Additionally, if you impose the death penalty, you must nate in writing the aggravating circumstance or circumstance you find beyond a reasonable doubt, and to the exclusion o other reasonable hypothesis, that existed as to each charge murder and armed robbery for which you have found the defend guilty.

Your verdict must be agreed upon by all twelve of you, be in writing, entered upon the punishment verdict form furn to you by the Court, date it, and signed by your foreman, and each of them into court for publication.

You may retire and begin your deliberations after you received the indictments, the evidence adduced on the trial then determine the penalty or punishment that shall be impo each indictment, and the number of aggravating circumstance which you base that decision, if any.

Now, you may retire.

Ladies and gentlemen, if you desire to go to lunch the the bailiffs and remember the instructions but retire to th room and we'll forward to you the instructions along with formation sheet and the indictments. You may retire.

APPENDIX C

Excerpt from Oral Argument in
Gregg v. Georgia, No. 74-6257

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In the

Supreme Court of the United States

Troy Leon Gregg,
Petitioner,
v.
State Of Georgia,
Respondent.

No. 74-6257

Washington, D. C.
March 31, 1976

Pages 1 thru 31

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APPENDIX C

IN THE SUPREME COURT OF THE UNITED STATES

TROY LEON GREGG, Petitioner,	:	
v.	:	No. 74-6257
STATE OF GEORGIA, Respondent.	:	

Washington, D. C.

Wednesday, March 31, 1976

The above-entitled matter came on for argument at 1:28 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

G. HUGHEL HARRISON, ESQ., P.O. Box. 88, Lawrenceville, Georgia 30245, for the petitioner.

G. THOMAS DAVIS, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia, for the respondent.

C O N T E N T S

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G. THOMAS DAVIS, ESQ., for the respondent	14

the sentence imposed in that particular case under review was disproportionate to the sentence imposed in other similar cases considering both the crime and the defendant.

A third thing the General Assembly did was to provide for a bifurcated trial procedure. They did not do this in the Death Sentence Act, but it was done before.

QUESTION: This wasn't a bifurcated proceeding at the trial level, was it?

MR. DAVIS: Yes, your Honor, it was. First there was a determination of guilt or nonguilt; second was the punishment.

QUESTION: Yes, with the judge instructing the jury at the second phase giving them for consideration three of the statutory aggravating circumstances and what, if any, mitigating circumstances. In the report to the appellate court he said there were none.

MR. DAVIS: That's right. He indicated there was no evidence submitted at the second phase of the trial in mitigation. I think that's what he had tendered on the court, and he saw none in the trial-in-chief.

QUESTION: Was anything proffered on behalf of the defendant?

MR. DAVIS: There was nothing proffered, your Honor.

His charge to the jury on that point is in appendix to brief at page 16. He charged that they could consider any

mitigating circumstances that they saw from the evidence.

QUESTION: You responded to Mr. Justice Stewart that there were two stages, two separate proceedings. But there are some crimes in Georgia which do not call for separate penalty proceedings, isn't that true?

MR. DAVIS: I'm not aware of any, your Honor. In all felony cases the law provides for bifurcated trial.

QUESTION: Precisely what issue is submitted to the jury in Georgia in the second trial? I have not read that instruction.

MR. DAVIS: The instruction, as I pointed out to the Court,was just what the Court charged them and mitigating factors.

QUESTION: Page 15 of the respondent's brief.

MR. DAVIS: The statute requires that the trial court determine from the evidence presented what statutory aggravating circumstances are warranted. He then gives those in charge to the jury and any mitigating that is presented or warranted by the evidence. They are also given to the jury in writing. The jury -- and of course argument by his counsel. Before he does this, of course, there is the opportunity for counsel to present additional evidence of aggravation or of mitigation.

QUESTION: In this case, as I understand, no evidence of mitigating circumstances was offered by the defendant.

MR. DAVIS: That is correct, your Honor.

QUESTION: And the jury in bringing in a verdict of recommending death, or bringing in a verdict of the death sentence, must include at least one of the statutory aggravating circumstances as found, at least one, and must so state and identify which one?

MR. DAVIS: That's right. In writing.

QUESTION: In writing.

MR. DAVIS: Beyond a reasonable doubt.

I believe, if I understood Mr. Harrison correctly, he stated that the jury found three statutory aggravating circumstances in this case. My recollection is they found two. Three were submitted to them, they refused to find No. (7).

Looking specifically now at the 10 statutory aggravating circumstances in Georgia, they are set out at pages 28 and 29 of respondent's brief. A number of these aggravating circumstances have been attacked, either by petitioner or amicus on behalf of petitioner, as being overly broad, as being meaningless. I want to look at a few of those now.

Take No. (2) which says that the act of murder and armed robbery or kidnapping, knowingly creating a great risk of death to anyone in a public place by means of a weapon, and so on, and endangering the lives of more than one person.

That could fit many things. But to understand that